




March 6, 2000


IN RE: DOCKET NO. 1999-469-C – BELL SOUTH – GUIDELINES FOR  
ALTERNATIVE REGULATION.


COPY OF **DIRECT TESTIMONY** OF HAMILTON E. RUSSELL FILED ON  
BEHALF OF TRIVERGENT COMMUNICATIONS HAS BEEN DISTRIBUTED TO:

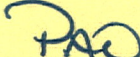
  
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Chief, McDaniel


  
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Legal Dept. (2)

  
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Exec. Director

  
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Manager, Utilities Dept.

  
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Accounting (1)

  
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Research (1)

  
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Commissioners (7)

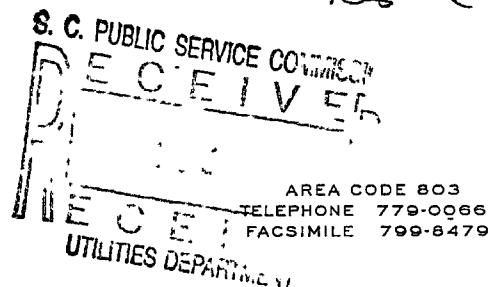
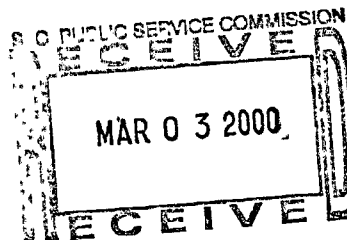
pao

BEACH LAW FIRM, P.A.  
ATTORNEYS AT LAW  
1321 LADY STREET, SUITE 310  
POST OFFICE BOX 11547  
COLUMBIA, SOUTH CAROLINA 29211-1547

JOHN F. BEACH  
JOHN J. PRINGLE, JR.

February 29, 2000

The Honorable Gary E. Walsh  
Executive Director  
South Carolina  
Public Service Commission  
Post Office Drawer 11649  
Columbia, South Carolina 29211



RE: Review of Proposed Guidelines for Prices Set by BellSouth  
Telecommunications, Inc. Pursuant to Section 576 of the South  
Carolina Code of Laws  
Docket No. 1999-469-C, Our File No. 00.25

Dear Mr. Walsh:

Enclosed is the original and twenty-five (25) copies of the **Testimony of Hamilton E. Russell** for filing on behalf of the TriVergent Communications in the above-referenced docket. By copy of this letter, I am serving all parties of record and enclose my certificate of service to that effect.

Please acknowledge your receipt of this document by file-stamping the copy of this letter enclosed, and returning it in the envelope provided.

If you have any questions or need additional information, please do not hesitate to contact me.

With kind regards, I am

Very truly yours,

John J. Pringle, Jr.

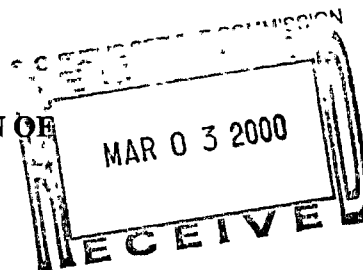
JJP/cr

cc: Hamilton E. Russell, Esq.  
All parties of record

Enclosure

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BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NO. 1999-469-C



IN RE: )

Review of Proposed Guidelines for Prices Set by) )  
BellSouth Telecommunications, Inc. Pursuant )  
to Section 576 of the South Carolina Code of )  
Laws )

CERTIFICATE OF SERVICE

This is to certify that I have caused to be served this day, one (1) copy of the **Testimony of Hamilton Russell, Esq.** by placing a copy of same in the care and custody of the United States Postal Service (unless otherwise specified), with proper first-class postage affixed thereto and addressed as follows:

Elliott Elam, Staff Attorney  
SC Department of Consumer Affairs  
PO Box 5757  
Columbia, SC 29250

Frank Mood, Esq  
**Sinkler & Boyd, PA**  
PO Box 11889  
Columbia SC 29211

Darra W. Cothran, Esq.  
**Woodward, Cothran & Herndon**  
PO Box 12399  
Columbia SC 29211

Terrance A. Spain, Esq.  
**(Representing Department of Defense/Federal Agencies)**  
Regulatory Law Office  
901 North Stuart St., Suite 700  
Arlington VA 22203

Caroline Watson, Esq.  
**BellSouth Telecommunications, Inc.**  
Legal Department  
1600 Hampton Street  
Columbia SC 29201

  
Carol Roof

February 29, 2000

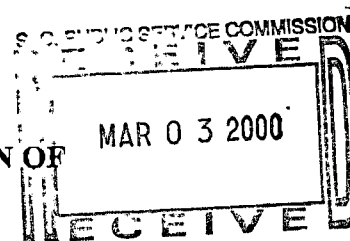
Columbia, South Carolina

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**REVISED**

**BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NO. 1999-469-C**



IN RE: )  
)

Review of Proposed Guidelines for Prices Set by )  
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901 North Stuart St., Suite 700  
Arlington VA 22203

Frank Rogers Ellerbe III, Esquire  
**Robinson, McFadden & Moore**  
P.O. Box 944  
Columbia, SC 29202

Caroline Watson, Esq.  
**BellSouth Telecommunications, Inc.**  
Legal Department  
1600 Hampton Street  
Columbia SC 29201

  
Carol Roof

March 3, 2000

Columbia, South Carolina

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POSTED  
W3-3-00

BEFORE THE  
SOUTH CAROLINA PUBLIC SERVICE COMMISSION

DOCKET NO. 1999-469-C



Review of Proposed Guidelines for Prices Set by )  
BellSouth Telecommunications, Inc. Pursuant to )  
Section 576 of the South Carolina Code of Laws )  
\_\_\_\_\_ )

TESTIMONY OF HAMILTON  
E. RUSSELL, III

**Q. Please state your name and business address.**

A. My name is Hamilton E. ("Bo") Russell III and my business address is 200 North Main Street, Suite 303, Greenville SC 29601.

**Q. By whom are you employed and in what capacity?**

A. I am the Vice President and General Counsel of TriVergent Communications ("TriVergent").

**Q. Please give a brief description of your responsibilities with TriVergent, as well as your legal background and experience.**

A. At TriVergent, I am responsible for addressing the various legal and regulatory matters that arise in the course of operating as a certified provider of local and long distance telecommunications services. I provide counsel on a variety of transactional, contractual, and marketing matters for the company. Prior to joining TriVergent, I was an associate with the firm of Haynsworth, Marion, McKay, and Guerard in Greenville from 1995 until early 1998. I received a *Juris Doctor* from the University of South Carolina in May of 1995, and a Bachelor of Arts from Washington and Lee University in 1992.

RETURN DATE: 01 DEC  
SERVICE: 01 DEC

**Q. What is the purpose of your testimony?**

A: The purpose of my testimony is to comment upon the “Guidelines for Prices Set by BellSouth” proposed by BellSouth Telecommunications, Inc. (“Proposed Guidelines”) pursuant to Section 58-9-576 of the South Carolina Code of Laws.

**Q: Why is TriVergent particularly concerned with BellSouth’s operation under Section 576?**

A: TriVergent is both a customer and competitor of BellSouth in South Carolina. In order to ensure that BellSouth does not abuse its market position, the Commission must provide a complaint process that allows companies like TriVergent a forum to allege and prove that BellSouth practices anti-competitive pricing.

**Q: What complaint process is envisioned by Section 58-9-576?**

A: Section 58-9-576(b)(5) provides that rates for all services other than basic residential and business local exchange services (“other services”) “are subject to a complaint process for abuse of market position.”

**Q: Does the phrase “considered just and reasonable” contained in Section 576(b)(2) insulate BellSouth’s rates in effect on July 14, 1999 from any ongoing Commission review?**

No. The language in Section 58-9-576(B)(2) provides that “on the date a LEC notifies the commission of its intent to elect the plan described in this section, existing rates,

terms, and conditions for the services provided by the electing LEC contained in the then-existing tariffs and contracts are considered just and reasonable.” BellSouth’s rates were “considered just and reasonable” on July 14, 1999, but were not granted some sort of immunity from review in perpetuity by Section 576. As set out herein, Section 576(b)(5), as well as other statutes of the South Carolina Code of Laws, give the Commission continued jurisdiction and power to determine whether BellSouth’s rates are “just and reasonable”, as well as otherwise in compliance with South Carolina law.

**Q: What BellSouth rates are subject to the complaint process for abuse of market position set out in Section 58-9-576(5)?**

**A:** All current and future BellSouth rates for “other services” must be subject to the complaint process in the guidelines adopted by the Commission in order to guarantee that Section 576 is implemented properly. The interpretation of Section 576 set forth in BellSouth’s Proposed Guidelines – that only rate changes are subject to challenge – completely ignores the purpose of the complaint process, and fails to recognize that a price in effect as of a certain date is not determinative of the existence of an abuse of market power or unreasonable discrimination. If adopted as proposed, the Guidelines would result in an empty procedure, under which neither interested parties nor the Commission could have any legitimate ability to ensure that BellSouth does not abuse its market position to the detriment of the telecommunications market in South Carolina.



**Q: Why must all rates for “other services” be subject to the complaint process envisioned by Section 576(b)(5)?**

A: The complaint process is designed to ensure that BellSouth’s rates do not represent an “abuse of market position”. That its rates were “considered just and reasonable” on July 14, 1999 is immaterial to the question of whether the rates in question reflect an abuse of market position. The relevant inquiry for determining an abuse of market position looks at BellSouth’s position in the market at the time the complaint is filed and similarly the state of competition in the market at that time, and examines whether the rate in question (or the proposed rate change) reflects a price that has or will have an anti-competitive effect in South Carolina. The state of the telecommunications industry in South Carolina will determine whether an abuse of market position is taking place: the entry into or exit from South Carolina by Competitive Local Providers (“CLPs”) of exchange and exchange access services; the existence of alternative providers for current and new services; the existence and deployment of new technologies; and a host of other factors, many of which cannot be pegged or predicted at this time. Reference to the level of BellSouth’s rates as of July 14, 1999 is therefore nonsensical in the context of pleading and proving an abuse of market position.

**Q: Does “just and reasonable” have the definition urged by BellSouth in its Proposed Guidelines, prohibiting interested parties from challenging rates for “other services” in effect on July 14, 1999?**

No. The term “just and reasonable”, besides being limited by Section 576(b)(5) in the

context of time, has a specific statutory meaning which further limits its scope and effect. The term is drawn directly from Section 58-9-210, which provides that “[e]very rate made, demanded or received by any telephone utility shall be . . . *just and reasonable*.” (Emphasis added). Thus, Section 58-9-576(B)(2) means only that on July 14, 1999, BellSouth’s rates satisfied Section 58-9-210 by being “just and reasonable.” The General Assembly’s use of the phrase “just and reasonable” in Section 576 clearly demonstrates its intent that the term be applied narrowly in the context of satisfying the requirements of Section 58-9-210.

**Q: Does South Carolina law require only that rates be “just and reasonable”?**

A: No. Section 58-9-210 is not the only statutory provision with which rates charged by a telephone utility must comply. For example, Section 58-9-250 (“Section 250”) provides that “[n]o utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any person or corporation or subject any person or corporation to any unreasonable prejudice or disadvantage. No telephone utility shall establish or maintain any unreasonable difference as to rates or service, either as between localities or as between classes of service.” In addition, as mentioned previously, Section 576(b)(5) establishes a complaint process for “abuse of market position,” setting out another separate and discrete standard with which BellSouth’s rates for “other services” must comply.

**Q: Did BellSouth's rates satisfy South Carolina law by being "considered just and reasonable" on July 14, 1999?**

A. No. The statutory language that BellSouth's rates were "considered just and reasonable" as of the date of its election under Section 576 did not include a determination that its non-basic services do not "unreasonably discriminate between similarly situated customers" (under Section 576 or Section 250). If "just and reasonable" had such a broad meaning, then Section 58-9-250, which holds BellSouth to an additional, separate standard, would be meaningless. Further, Section 576(B)(5) specifies that even though rates are considered just and reasonable on the date of election, BellSouth "*shall* set rates for all other services on a basis that does not unreasonably discriminate between similarly situated customers . . ." (Emphasis added). Thus, if rates are unreasonably discriminatory, BellSouth is obligated to adjust those rates. Because the Commission or has not concluded that these rates are not unreasonably discriminatory, at the very least Section 576 gives a party the opportunity to make such a challenge. Similarly, BellSouth has not demonstrated that its rates do not reflect an "abuse of market position."

**Q: Please summarize TriVergent's position with regard to the effect of BellSouth's Section 576 election on July 14, 1999.**

A: BellSouth's rates for "other services" were "considered just and reasonable" on that date. That consideration does not extend indefinitely, nor does it foreclose continuing Commission jurisdiction to ensure that these rates continue to be just and reasonable, do not represent unreasonable discrimination, and do not reflect an abuse of market position.

**Q: What is TriVergent's response to BellSouth's proposed definition of "abuse of market position"?**

A: I am neither an economist nor an anti-trust lawyer. Other parties in this Docket will address in depth BellSouth's proposed standard for "abuse of market position." I urge the Commission, however, to make sure that the definition adopted for the Guidelines does not place too heavy a burden upon a Complainant in pleading and proving that an "abuse of market position" is taking place.

**Q: Should the complaint process give the Commission Staff the authority to stay the effectiveness of tariff filings made pursuant to Section 576(b)(6)?**

A: Unquestionably. The presumption of validity for tariff filings set out in Section 576(b)(6) does not automatically equate with effectiveness. The Commission or its Staff has the power to stay proposed tariff revisions pending an investigation or review in many circumstances. Article III, Subsection 6 provides that no party has the ability to stay the effectiveness of these tariff filings for any reason whatsoever. This language is contrary to Commission jurisdiction and practice. The Proposed Guidelines should allow the Commission or the Staff to stay the effectiveness of the tariff revisions pending an investigation by the Staff or a complaint proceeding.

**Q: Does Article III, Subsection 7, wherein BellSouth proposes that its “price increases for services other than Basic Services shall not exceed five percent (5%) of aggregate revenues in a twelve (12) month period” provide a reasonable benchmark?**

A: From TriVergent’s point of view, this standard is meaningless. The anti-competitive threat to TriVergent from BellSouth’s prices lies not in the effect these prices have on BellSouth’s revenues, but rather on TriVergent’s bottom line.

**Q: Have you reviewed “Article IV. Process for Complaints of Violations of Price Setting Guidelines”?**

A. Yes. First of all, in Subsection 2 of Article IV, TriVergent objects strongly to the following language: “This process will be monitored by Commission Staff to ensure that it is not used for the mere purpose of creating protracted and expensive hearings to thwart competition every time a tariff revision is filed.” Putting aside the fact that the “purpose” of any party’s use of the process is irrelevant as long as the complaining party can demonstrate unreasonable discrimination or an abuse of market position, the implication that TriVergent or any other party would or could use the complaint process to “thwart competition” is just plain wrong (as well as insulting), and has no place in a document to be adopted by the Commission. The Commission should reject this proposed language.

**Q: Please comment on Article IV, Subsection Five, “The Complaint”.**

A: TriVergent objects to the inclusion of the standards for establishing unreasonable discrimination and abuse of market position in Subsections 5(i)(a) and (b). The



complaining party has the obligation to plead a violation of Section 576(b)(5) in its Complaint, not establish a violation therein. The complaining party will establish that a violation has occurred after the complaint, discovery, and a hearing before the Commission. Therefore, any standard adopted by the Commission for demonstrating an abuse of market position should have its own discrete subsection in the Guidelines.

**Q: Should the Guidelines include a “Threshold Determination” as proposed in Article IV, Subsection 7?**

A: No. Such a determination is completely unnecessary. Section 58-9-1110 of the South Carolina Code of Laws already provides that “[t]he Commission may dismiss any complaint without a hearing if in its opinion a hearing is not necessary in the public interest or for the protection of substantial rights.” BellSouth has made no demonstration that such a “threshold determination” is warranted for this process, and the Commission should decline to adopt this subsection.

**Q: How does the “Threshold Determination” adversely affect the rights of the Complaining Party?**

A: A more thorough review of the “Threshold Determination” demonstrates how the process as proposed tilts the playing field in favor of BellSouth. Article IV, Subsection 5(ii) requires the complainant to provide “supporting documents and verified pre-filed testimony” along with its Complaint. By contrast, BellSouth’s answer need only set out BellSouth’s responses to allegations of discrimination [Subsection 6(ii)(a)], abuse of

market position [Subsection 6(ii)(b)], and “any other defenses to the allegations” [Subsection 6(ii)(c)]. Only upon a Commission determination that the threshold standard has been met (Subsection 9) is BellSouth required to “file any additional defenses, all supporting documents, and verified testimony.” Not only is the Complainant foreclosed from obtaining documents in support of BellSouth’s position or verified testimony until after the “threshold determination” is made, but BellSouth is granted leave to “file additional defenses” at that time, even though the Guidelines require BellSouth’s Answer to set forth all of its defenses. Presumably this means that once the Commission has determined that the threshold determination has been satisfied, BellSouth can pull out its big guns (supporting documents) and put in its first team (the defenses it did not put forth in response to the initial complaint). These provisions demonstrate why the Commission should decline to adopt the entire section entitled “Threshold Determination.”

**Q: In summary, do the Proposed Guidelines provide an adequate mechanism to challenge BellSouth’s rates?**

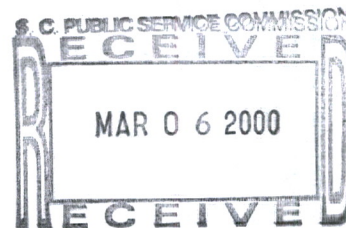
**A:** No. By attempting to limit the complaint process to rate changes, and proposing an unjustified and completely superfluous “Threshold Determination”, the Proposed Guidelines seek to limit the ability of TriVergent and other parties to bring evidence of anti-competitive behavior before the Commission. The Commission must subject all of BellSouth’s rates for “other services” to the complaint process mandated by Section 276(b)(5), and is obligated to provide a complaint process that does not place an undue burden on a party challenging rates.

**Q: Does this conclude your testimony?**

**A: Yes.**



**REVISED**



**BEFORE  
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SOUTH CAROLINA  
DOCKET NO. 1999-469-C**

IN RE:

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